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Pipeline regulation: an overview
for landowners and tenants

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National Energy Board



INFORMATION BULLETIN XIII

January 1997

Pipeline Regulation: An Overview for Landowners and Tenants

Synopsis

Landowner and tenant rights are important aspects of the National Energy Board's regulation of pipelines. This bulletin describes how the Board takes these aspects into account, and how landowners and tenants may exercise their rights and participate in the process.

THE BOARD

The National Energy Board is an independent regulatory tribunal that was created by the Parliament of Canada in 1959. Its powers and jurisdiction are based on the *National Energy Board Act*, the *Canada Oil and Gas Operations Act* and certain provisions of the *Canada Petroleum Resources Act*. The purpose of the Board is to make decisions that are fair, objective, and respected. The Board achieves this purpose by regulating in the Canadian public interest certain areas of the oil, gas, and electric utility industries. Copies of the Acts are available from the Board and from the Canada Communications Group, Public Works and Government Services Canada, 45 Sacré-Coeur Blvd., Hull, Quebec, K1A 0S7.

PUBLICATIONS

This information bulletin is one of a series that the Board publishes on its activities and procedures. Comments on this bulletin or suggestions for future topics are welcome. These bulletins provide general information only. For details of particular items, reference must be made to the relevant legislation. The *National Energy Board Act* and the regulations will prevail in the case of a conflict with information contained in this bulletin.

BULLETINS IN THIS SERIES

1. Pipeline Route Approval Procedures
2. The Public Hearing Process
3. Non-Hearing Procedures
4. How to Participate in a Public Hearing
5. The Board's Publications
6. The Regulation of Tolls and Tariffs
7. The National Energy Board Library
8. Electric Power: A Compendium of Terms
9. Protection of the Environment
10. Pipeline Tolls and Tariffs: A Compendium of Terms
11. The Frontier Information Office
12. Pipeline Safety
13. Pipeline Regulation: An Overview for Landowners and Tenants

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Introduction

Individuals living along pipeline routes may be affected by the planning, construction, operation, maintenance and abandonment of a pipeline. Because of this, it is in the public interest that pipeline activities are conducted in ways which avoid unnecessary disturbances to the land and cause as little interference as possible with existing activities.

Negative impacts on human activities and the environment may be reduced or avoided through the careful study of alternate routes. The aim is to protect sensitive areas for wildlife, plants, fish and human activities. The Board's regulatory process is designed to prevent

problems from occurring, and to deal effectively with issues that may arise.

A company proposing to build, expand, operate or extend an interprovincial or international pipeline must first apply to the National Energy Board (the Board) for approval. Among other considerations, the Board examines the proposed pipeline route, the amount of land rights sought, and the land acquisition process. This bulletin describes how the Board's pipeline regulatory process takes these factors into account and how landowners and tenants may participate in this process.

Public Involvement

To ensure early, ongoing and full public awareness of proposed pipeline projects, companies are usually required to carry out an early public notification program. The purpose is to inform the public about the nature of a proposed pipeline project, to identify potential adverse effects, and to provide an opportunity for the public to influence the project design. Notification programs can include several activities, such as public meetings, newsletters, personal mail, and personal contacts. The method a company employs to inform the public and obtain feedback usually depends on the size of the project and the significance of potential impacts.

If consultation has been inadequate or has failed to resolve issues of concern, affected parties may contact the Board and discuss ways of having their concerns formally addressed.

In addition to the early public notification process, the public may also participate in the public hearing process. To participate, interested persons and/or groups must send a letter or facsimile of intervention to the Secretary of the Board stating their interest, reasons for wanting to participate, and any issues they want to raise. Alternatively, interested persons and/or groups may submit letters of comment.

Once registered as an intervenor, parties are entitled to receive a copy of the application from the company and any further material filed by the company, other intervenors, or the Board. At a hearing, intervenors may cross-examine the company's witnesses and present their own evidence and argument. An intervenor's evidence and witnesses are also subject to cross-examination by other parties.

Pipeline Approval Process

As a basis for its decision on a pipeline application, the Board takes into consideration relevant matters, such as safety, environmental protection, and social and economic impacts. Public hearings are required for all proposed pipelines more than 40 kilometres in length. The Board, at its discretion, may also conduct a public hearing for other facility applications when public interest warrants.

The Board's examination of a company's proposed route for major pipelines and facilities greater than 40

kilometres has two stages. The first stage involves the examination of the general route and the approval of the project. Once the project is approved, the second stage determines the exact or detailed pipeline route.

First Stage: Approval of the Project

The process begins when a company applies to the Board for approval to construct and operate a pipeline. Once the Board determines that an application is complete, it sets a date for a public hearing.

One purpose of the hearing is to determine the acceptability of the general route, taking into consideration economic, engineering, environmental, safety, and socio-economic concerns. When the Board announces the hearing, it will also publish a hearing order containing the directions on procedure to be followed by the applicants and intervenors. The hearing order also gives the date and location of the hearing, deadlines for submissions and a list of issues to be considered.

Once a hearing order is issued, the application and other related documents are available for public viewing at the head office of the applicant company and in the Board's Library. If the application is expected to draw significant local attention, copies may also be made available through municipal offices and/or libraries along the proposed route. In addition, all registered intervenors will receive a copy of the company's application.

The Certificate of Public Convenience and Necessity, if granted, provides the company with approval for the project and for the general route of the pipeline. It is important to note that this approval does not preclude a landowner's and tenant's right to object to the final route. The detailed route is determined during the second stage of approval.

Second Stage: Approval of the Detailed Pipeline Route

The detailed route process is designed to involve all landowners and affected parties in the examination of the final pipeline route. The process begins when the company files its plans, profiles and books of reference (PPBR) for the pipeline. The PPBR identifies the precise location of the pipeline, the lands to be crossed, the types and amounts of land rights required, and the affected landowners and tenants.

Once the PPBR has been filed, the company must serve Section 34 (1)(a) Notices on all landowners from whom land or land rights are required. A Section 34 (1)(a) Notice of the *National Energy Board Act* (NEB Act) describes the proposed detailed route of the pipeline and the procedure people can follow to present their objections to the Board. The company must also place a Section 34 (1)(b) Public Notice in at

least one issue of a local newspaper circulated in the affected areas. The public notice must include the same information as the Section 34 (1)(a) Notice. Anyone opposing the proposed route has 30 days after receiving the notice to file a written statement with the Secretary of the Board and the company explaining their interest and the reasons for their opposition. Tenants and other affected parties have 30 days after the last publication of the public notice to file a similar statement with the Board. The Board seriously considers all relevant statements, however it has the authority and obligation to disregard statements which may be considered frivolous or vexatious.

If no objections to the detailed route are received, the Board may approve the PPBR without a public hearing. However, if an objection to the route is received, the Board must hold a public hearing in the vicinity of the affected lands. The Board may approve portions of the route in those areas where no objections were received. Intervenors at the detailed route hearing have the opportunity to cross-examine the company's witnesses and to present their own evidence concerning the best possible route for the pipeline and the most appropriate methods and timing of construction.

After reviewing all evidence, the Board decides whether to approve or deny the company's PPBR, and thus the final detailed route. If all or part of the route is rejected, the company must submit a revised PPBR. The process of determining the detailed route must then be repeated for those areas which were amended. When the final route is approved, a copy of the Board's ruling is sent to the Minister of Natural Resources and to each intervenor.

After the detailed route has been approved, any landowner, tenant or affected party has the right under Section 21 of the NEB Act to request that the Board review its decision. Parties may also seek leave to appeal the Board's decision to the Federal Court of Appeal on a question of law or jurisdiction.

Pipeline Facilities Less than 40 kilometres

As previously mentioned, new pipelines or additions to existing pipeline facilities must receive the Board's approval prior to construction and operation. For a

proposed pipeline not more than 40 kilometres in length, the Board may consider the matter internally and authorize the construction and operation without a public hearing. These facilities may include a pipeline and related facilities such as compressor stations, metering facilities, pumping stations and communications equipment. However, the Board may choose to hold a hearing if the applied-for facilities appear controversial or if there is sufficient public interest.

Exemption from the Detailed Route Process

For a pipeline under 40 kilometres, where routing concerns are unlikely, a company may apply to the Board for an exemption from a detailed route hearing. This exemption may be granted on condition that the company acquires all the land rights necessary for the project. It is important to note that even if this exemption is granted, a landowner or tenant retains the right to object to the proposed route on matters of routing, method and/or timing of construction. Landowners or tenants who have concerns regarding the route may write to the Board identifying their concerns and requesting a detailed route hearing to examine the appropriateness of the proposed route and land requirements.

Cost Awards and Intervenor Funding

In general, parties participating at Board hearings do so at their own expense. During a detailed route hearing, costs can be awarded for reasonable expenses incurred by a person making representation to the

Board. In the event of a detailed route hearing and where a person and a company do not agree on the amount of reasonable costs, the Board has the power under the NEB Act to award costs for actual expenses reasonably incurred. Examples of reasonable costs may include legal fees, hiring of consultants, or simply the costs of attending the hearing.

The Board does not currently have the authority to provide intervenor funding.

Monitoring and Follow-up

The Board's approval of a project may contain a set of written terms and conditions to ensure construction, operation and maintenance are undertaken in a safe and environmentally sound manner, and that the right-of-way is properly restored. It is the Board's practice to inspect pipelines during construction, and then during the agricultural growing season for two years following the completion of construction. After this period, inspections are scheduled according to environmental and safety sensitivities, and any unresolved right-of-way issues.

Companies also monitor their pipeline's rights-of-way and have in place regular inspection programs. They also conduct ongoing consultation programs with landowners and tenants along the pipeline route. Despite these measures, there may be occasions when problems are not dealt with to a landowner's or tenant's satisfaction. The Board should be made aware of these situations as soon as they arise.

Land Acquisition

Consultation

When lands are required for pipeline purposes, a company will contact the landowner to discuss the right-of-way and related requirements. The exact timing of the contact is up to the company, but usually it is well in advance of an application to the Board. Typically, the land requirements include a permanent easement and possibly a temporary work space to be used only during the construction period. The use of temporary work space is normally negotiated as a short-term contract between the company and the landowner.

The negotiation of temporary work space is not normally considered a land acquisition and does not require a formal notice or an easement agreement.

Section 87 Notices

When a company determines what lands may be required for a pipeline project, the Board requires that the company serve a notice under Section 87 of the NEB Act on affected landowners and tenants. The purpose of the notice is to ensure that potentially affected landowners and tenants are informed of pro-

posed pipeline activity in advance of an offer to acquire land rights, and that they are in possession of information necessary to properly exercise their rights. Under the NEB Act, if a land acquisition agreement is entered into before the notice is served, that agreement becomes void.

The notice must provide several kinds of information:

- identification and description of the lands required;
- details of the basis for and the amount of compensation;
- description of detailed route approval procedures; and
- procedures for compensation negotiation and arbitration should no agreement be reached.

A more complete listing of Section 87 provisions can be found in the NEB Act. Copies of the Act are available from the Board.

When a company officially serves a landowner or tenant with a Section 87 Notice, and subsequently decides not to acquire part or all of the specified lands, the company is liable to pay reasonable costs incurred by the owner or tenant. An example is when a portion of a field designated for a right-of-way is not planted in anticipation of construction proceeding in the current growing season. If the company subsequently cancels the project, payment for the loss of the crop is required.

The Easement Agreement

Having served a Section 87 Notice, a company is free to acquire land rights through an easement agreement. An easement is defined as a right acquired by a person to use the land or property of another for a special or particular purpose. Easement agreements provide companies with the right to construct, operate, maintain, inspect and repair a pipeline together with all facilities or works used in connection with the pipeline. In addition, easement agreements contain specific clauses to protect the pipeline from damage, and restrict incompatible or unsafe activities. These clauses require a landowner or tenant to obtain the written permission of the company prior to constructing or excavating on the right-of-way.

At a minimum, easement agreements must meet the prescribed requirements of Section 86 of the NEB Act. This is intended to ensure that landowners and/or tenants have the information necessary to properly exercise their rights. All easement agreements must contain the following provisions:

- a choice of a lump sum, periodic or annual compensation payment;
- a five year review requirement for annual or periodic payments;
- indemnification of the landowner and/or tenant from all liabilities and damages; and
- the restriction of the use of lands to the applied-for pipeline facilities.

A more complete listing of Section 86 provisions can be found in the NEB Act.

The easement agreement will specify restricted uses on or across the right-of-way and any uses where the company's permission must be sought. The continuation of past agricultural uses and practices on or across the right-of-way is permitted.

It should be noted that the easement agreement once signed is a binding agreement on the current owner and all future owners of the subject land. The agreement is a legal document registered in a land titles or registry office. Prior to signing, landowners have the right to review each clause in the agreement and to negotiate additions, alterations or deletions of clauses. Landowners may seek legal advice and request the reasonable costs of this advice from the company as part of the compensation package for the agreement.

Should landowners or tenants disagree with the pipeline route or reject a company's compensation offer, they are entitled to seek remedies through the detailed route hearing and the compensation process.

Option Agreement

An option agreement is a binding document of intent, and therefore its contents should be reviewed carefully before signing. In signing this contract and in accepting a payment, the landowner agrees to enter into an easement agreement by a given date, should the company choose to exercise its option. This procedure

provides the company with greater certainty that it will be able to obtain all required easement rights within its planned time frame.

The NEB Act requires that an option agreement contain the criteria specified in Section 86. In addition, a Section 87 Notice must be served prior to the option agreement being signed. Should a landowner choose to sign an option, the landowner may forego the right to a detailed route hearing and the right to the independent compensation process of payment for the easement rights, although not for compensation matters dealing with damages.

Controlled Area

In addition to the specific right-of-way that is acquired under an easement agreement, there is an additional 30 metre controlled area on both sides of the right-of-way. The controlled area is provided for under the NEB Act to restrict excavation activities which could pose a threat to public safety, the environment or pipeline operations. The controlled area is intended to prevent accidents that could result in environmental damage, and injury or death to workers and bystanders.

Anyone planning to excavate using power equipment or explosives for any purpose (for example to construct a road, irrigation system, dugout or foundation) within a 30 metre controlled area **must** first obtain the pipeline company's permission. Should the company refuse, an application may be made to the Board. In most circumstances, permission would be given by companies and only in exceptional cases have applications come before the Board.

To put matters in perspective, the controlled area is a similar concept to the familiar "call before you dig" programs. A detailed booklet, titled *Excavation and Construction Near Pipelines*, is available from the Board.

Right of Entry Onto Lands

The NEB has the authority to expropriate lands for pipelines. Once a pipeline has been approved, and where an easement agreement has not been signed, a company can apply to the Board for a right of entry (expropriation) order. A company must notify the landowner and/or tenant in writing of the intention to make an application to the Board not less than 30 days and not more than 60 days before it files its application.

The landowner and/or tenant has an opportunity to send a written objection to the Board at any time after the receipt of the notice up to the time that the company files the application with the NEB. The Board must then decide on whether to grant or deny a right of entry order.

Where the Board grants a right of entry, the company is given the rights, titles and interest in the lands as specified in the order. After the company registers the order in the appropriate land titles or registry office, it may under law commence construction. At this stage, the landowner and/or tenant becomes entitled to an advance of compensation. This payment does not prejudice the negotiation of a final compensation package with the company, or the right to apply to the Minister of Natural Resources to have an arbitration committee appointed to establish compensation.

Compensation

Basis for Compensation for Rights-of-Way

The amount of compensation for an easement takes into consideration the fair market value of the land as applied to the area of easement granted. Fair market value is determined on the basis of professional appraisal principles, including compensation previously paid in comparable situations, the zoning of the

property, current land use, and adjacent or neighbouring land use.

In setting the compensation, a company typically retains qualified appraisers and consultants. The goal is to negotiate a mutually satisfactory settlement. However, should a landowner disagree with the appraisal provided by the company, the landowner can

ask the company if it would agree to cover the costs for an independent appraisal. Moreover, a landowner who wants legal advice before signing an easement agreement may ask a company to cover these costs as well.

Compensation is also available for, but not limited to, the following:

- the use of any temporary work space;
- the reasonable time involved in negotiating the easement agreement;
- inconveniences/nuisances related to pipeline installation;
- loss of the use of land for crops or pasture; and
- any damages resulting from surveying, construction, inspections or maintenance work, including damage to crops, fences, tile drains, trees and access roads.

Compensation may be in the form of direct replacement for items such as fences, trees or topsoil removed, or in the form of payment in lieu of replacement.

Some of the above categories cover compensation that may be claimed by a tenant, as well as the landowner. For example, tenants may seek compensation for the temporary loss of use of lands for crops or pasture, or for damage to any improvements they may have made to the property. Settlement with a tenant may entail the participation of the landowner, if the tenancy lease requires it.

Dispute Resolution Procedures

Landowners and/or tenants do not have to accept a company's offer. There may be disagreement with the company's basis for compensation or the comparisons used. There may also be disagreement with what has or is causing damage, or the extent of any damage. Landowners and/or tenants have the right to apply to the Minister of Natural Resources for negotiation and/or binding arbitration to resolve disagreements or disputes related to compensation for the acquisition of lands or damage suffered. A company is also entitled to apply to the Minister of Natural Resources to have

a disagreement resolved. The Board does not have responsibility for any compensation matters. This responsibility is vested solely in the Minister.

Compensation is not limited to landowners and tenants on the right-of-way. Owners of adjacent lands may experience damages due to a pipeline project. Anyone who is adversely affected and can demonstrate the actual costs of damages resulting from pipeline construction and operation, is entitled to request compensation from the company, and to apply for a negotiator and/or arbitration when matters cannot be mutually resolved.

Resolution Procedure Under the Negotiator Option

In the event that a settlement cannot be reached, either the company, or the landowner and/or tenant may apply to the Minister for the appointment of a negotiator to assist in the settlement of the disagreement. Within 60 days of the start of the process, the negotiator must issue a report on the outcome of negotiations to the Minister of Natural Resources, with a copy to each party. The negotiator cannot issue binding decisions. Parties may choose to bypass the negotiation option and go directly to arbitration.

Resolution Procedure Under the Arbitration Option

Under the arbitration process, the compensation matter is referred to an Arbitration Committee of not less than three members appointed by the Minister of Natural Resources. The Arbitration Committee has the power to hold a hearing, to swear in and examine witnesses, to produce and inspect documents, and to enforce its decisions. The reasons for the Committee's decision are always in writing, and are binding and legally enforceable.

In reaching its decision, the Arbitration Committee considers a number of factors, including where applicable:

- market value of the land being taken;
- loss of use of the land;

- adverse effects of acquisition on remaining lands;
- nuisance, inconvenience and noise considerations; and
- damage to lands, livestock or personal property from the company's operations.

A more detailed list of factors is provided under Section 97 of the NEB Act. Copies of the Act are available from the Board.

An Arbitration Committee must ensure that as a condition of any award, a landowner can choose between a lump sum, annual, or periodic payment for the land acquisition. Where an annual or periodic payment is chosen, a provision for a five year review of the amount must be included in the Committee's decision. As well, the decision must include provisions for: compensation for damages suffered from company operations; indemnification from all liabilities, damages, suits and actions arising out of company operations; and for the restriction on the use(s) specified in the easement agreement.

Where the amount of compensation awarded through arbitration exceeds 85 per cent of the amount that

was offered by the company, the company must pay reasonable costs incurred by the landowner or tenant in preparing and presenting the compensation claim. Where the award does not exceed 85 per cent, then it is the Arbitration Committee's choice on how to allocate costs between the parties. The Committee also has the power to award interest payments at the prime rate for the awarded compensation.

For further information or assistance please contact:

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